Supreme Court, U.S.
FILED
NOV 21 1991
OFFICE OF THE CLERK

No. 91-119

In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

On Writ Of Certiorari To The Supreme Court of Wisconsin

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER, BY THE STATE OF NEW JERSEY AND THE STATES OF ALASKA AND ARKANSAS

MARY R. HAMILL
Deputy Attorney General
Of Counsel

SARAH T. DARROW
Deputy Attorney General
Counsel of Record
On the Brief

ROBERT J. DEL TUFO
Attorney General of
New Jersey
R.J. Hughes
Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 633-8455

(Counsel continued on inside cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

CHARLES E. COLE
Attorney General
of Alaska
State Capitol
P.O. Box K
Juneau, Alaska 99811-0300
(907) 465-3600

WINSTON BRYANT
Attorney General
of Arkansas
200 Tower Building
323 Center Street
Little Rock, Arkansas 72201
(501) 682-2007

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT..... 1

ARGUMENT:

CONTRARY TO THE LEGISLATIVE HISTORY OF PUBLIC LAW 86-272, THE WISCONSIN SUPREME COURT ENLARGED THE FEDERAL STATUTORY PROHIBITION ON STATE NET INCOME TAXATION IN PUBLIC LAW 86-272 BEYOND THE MERE SOLICITATION OF ORDERS..... 2

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES CITED

Amway Corp., Inc. v. Director of Revenue, 794 S.W.2d 666 (Mo. banc 1990) 9

Bank of Commerce v. State of Tenn., 109 U.S. 493 (1881) 10

Chattanooga Glass Co. v. Strickland, 244 Ga. 603, 261 S.E.2d 599 (1979) 4

Clairol, Inc. v. Kingsley, 109 N.J. Super. 22, 262 A.2d (App. Div. 1970), aff'd 57 N.J. 199, 270 A.2d 702 (1970), *appeal dismissed* 402 U.S. 902 (1971) 1, 3, 4, 5, 9

Coors Porcelain Company v. State, 183 Colo. 325, 517 P.2d 838 (1973), *cert. denied*, 419 U.S. 874 (1974) 4

Deseret Pharm. Co., Inc. v. State Tax Comm., 579 P.2d 1322 (Utah 1978) 4

Drackett Products Co. v. Conrad, 370 N.W.2d 723 (N.D. 1985) 4

Garcia v. San Antonio Metro Transit Authority, 469 U.S. 528 (1985) 10

Gillette Company v. State Tax Commission, 56 A.D.2d 475, 393 N.Y.S.2d 186 (1977), aff'd, 410 N.Y.S.2d 65, 382 N.E.2d 764 (1978) 4

Herff Jones Company v. State Tax. Comm., 217 Or. 404, 430 P.2d 998 (1967) 4

Hervey v. AMF Beaird, Inc., 250 Ark. 147, 464 S.W.2d 557 (1971) 4

Heublein v. South Carolina Tax Comm., 409 U.S. 275 (1972) 10

TABLE OF AUTHORITIES – Continued

Page

Hicks v. Miranda, 422 U.S. 332 (1975) 3

Hoge v. Richmond & D.R. Co., 99 U.S. 348 (1878) 10

Ind. Dept. of Revenue v. Kimberly-Clark Corp., 275 Ind. 378, 416 N.E.2d 1264 (1981) 4

Mandel v. Brady, 432 U.S. 173 (1977) 3

Miles Laboratories, Inc. v. Dept. of Revenue, 274 Or. 395, 546 P.2d 1081 (1976) 4

National Tires, Inc. v. Lindley, 68 Ohio App.2d 71, 426 N.E.2d 793 (1980) 4, 5

Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) 5

Ringgold Coal Mining Co. v. Taxation Div. Director, 4 N.J. Tax 321 (Tax Ct. 1982) 4

Sjong v. Alaska State Dept. of Revenue, 622 P.2d 967 (Alaska 1981), *appeal dismissed* 454 U.S. 1131 (1982) 4

State v. State Tax Commission, 382 S.W.2d 645 (Mo. 1964) 4

U.S. Tobacco Co. v. Comm., 478 Pa. 125, 386 A.2d 471, *cert. denied*, 439 U.S. 880 (1978) 4

U.S. Tobacco Co. v. Martin, 304 Ark. 119, 801 S.W.2d 256 (1990) 4, 5

United States v. Bass, 404 U.S. 336 (1971) 10

William Wrigley, Jr. Co. v. Wis. Dept. of Rev., 153 Wis.2d 559, 451 N.W.2d 444 (Wis. App. 1989) 4

TABLE OF AUTHORITIES – Continued

Page

William Wrigley, Jr. Co. v. Dept. of Revenue, 160 *Wis.*2d 53, 465 *N.W.*2d 800 (1991) 2, 8

Wright v. Nagle, 101 *U.S.* 791 (1879) 10

STATUTES CITED

15 *U.S.C.* § 381 ..... 1, 3, 9

Public Law 86-272; 73 *Stat.* 555 ..... *passim*

LEGISLATIVE MATERIALS

S.2524 Debate, 86th Cong., 1st Sess., 105 *Cong. Rec.* (1959)

Page 16,355 ..... 6, 9

Page 16,360 7

Page 16,376 7

Page 16,470 7

Page 16,472 7

Page 16,477 ..... 7, 9

Page 16,493 8

Page 16,494 6

1959 *U.S. Code Cong. & Ad. News* p. 2557 8

MISCELLANEOUS

Tatarowicz, State Judicial and Administrative Interpretations of U.S. Public Law 86-272, 38 *Tax Lawyer* 294 (1985) 4

INTEREST OF AMICI CURIAE

The signatory States submit this brief as *Amici Curiae* in support of the Petitioner, Wisconsin Department of Revenue, because we believe that the Wisconsin Supreme Court's overbroad interpretation of a federal statute, 15 *U.S.C.* §381, commonly known as Public Law 86-272 (hereinafter "P.L. 86-272"), will result in loss of state tax revenues. All of the signatory States have enacted net income taxes or franchise taxes measured by net income which are impacted by P.L. 86-272. Unless this Court reverses the Wisconsin Supreme Court's expansion of the state income tax exemption created by P.L. 86-272, the States face reduced revenues and numerous claims for refunds of taxes previously collected from multistate firms. The signatory States, therefore, respectfully urge this Court to adopt a strict construction of P.L. 86-272, thereby assuring that multistate businesses pay their fair share of the tax revenue required to support state and local governments.

SUMMARY OF ARGUMENT

In *Clairol, Inc. v. Kingsley*, 109 *N.J. Super.* 22, 262 *A.*2d (App. Div. 1970), aff'd 57 *N.J.* 199, 270 *A.*2d 702 (1970), *appeal dismissed for want of a substantial federal question*, 402 *U.S.* 902 (1971), the New Jersey courts adopted what is widely recognized as a strict construction of the term "solicitation of orders," thereby affirming the limited scope of the state income tax exemption created by Public Law 86-272. The legislative history of the statute fully supports the conclusion of the New Jersey courts, and

other state courts, that the statute was meant to protect *only* the solicitation of orders; a firm that conducts any other in-state business activities, even those which may eventually lead to increased sales, is properly subject to state taxation. This strict interpretation of the statutory language is consistent with this Court's traditional rules for the construction of tax exemption statutes, and with the principles of federalism.

ARGUMENT

CONTRARY TO THE LEGISLATIVE HISTORY OF PUBLIC LAW 86-272, THE WISCONSIN SUPREME COURT ENLARGED THE FEDERAL STATUTORY PROHIBITION ON STATE NET INCOME TAXATION IN PUBLIC LAW 86-272 BEYOND THE MERE SOLICITATION OF ORDERS.

The Wisconsin Supreme Court erred in its broad interpretation of Public Law 86-272* in *William Wrigley, Jr.*

* The federal statute at issue in this case, Public Law 86-272, provides in pertinent part:

> (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if *the only business activities within such State* by or on behalf of such person during such taxable year are either, or both of the following:
>
> (1) *the solicitation of orders* by such person, or his representative, in such State for sales of tangible

(Continued on following page)

Co. v. Dept. of Revenue, 160 *Wis.*2d 53, 465 *N.W.*2d 800 (1991). The Wisconsin Tax Appeals Commission had found that Wrigley representatives engaged in various business activities in Wisconsin which exceeded the exempt "soliciation of orders." These activities included setting up displays, replacing stale products, direct sales of gum, maintaining home offices, renting storage space and conducting training seminars. *Id.* at 811. Reversing the Tax Appeals Commission, the Wisconsin Supreme Court has enlarged the P.L. 86-272 exemption to encompass all of these activities, finding that Wrigley's activities were all "incidental to the solicitation of orders of gum" or were "so minor as to be *de minimus*." *Id.*

The Wisconsin Court's expansive construction of this federal statute is in direct conflict with a decision of the New Jersey Supreme Court. *Clairol, Inc. v. Kingsley*, 109 *N.J. Super.* 22, 262 *A.*2d 213 (App. Div. 1970), aff'd 57 *N.J.* 199, 270 *A.*2d 702 (1970), *appeal dismissed*, 402 *U.S.* 902 (1971). In that case, the New Jersey court held, and this Court confirmed through its dismissal of the appeal for want of a substantial federal question,* that P.L. 86-272

(Continued from previous page)

> personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State. . . . [15 *U.S.C.* §381(a); emphasis supplied].

* This Court has previously held that such a dismissal of a case is a disposition on the merits when the case arises under the Court's appellate jurisdiction. *Hicks v. Miranda*, 422 *U.S.* 332, 344 (1975); *Mandel v. Brady*, 432 *U.S.* 173, 176 (1977). The Wisconsin Supreme Court refused to follow *Clairol* in its construction of the federal statute.

should be construed *narrowly* so that it would not insulate corporate activities which go beyond the mere solicitation of orders. *Clairol, supra,* 109 *N.J. Super.* at 28-29; 262 *A.*2d at 217.* *Clairol* expressly rejected the contention, apparently

---

* The *Clairol* decision is generally recognized as embodying a strict construction of the statutory language. *Hervey v. AMF Beaird, Inc.*, 250 *Ark.* 147, 464 *S.W.*2d 557, 562 (1971); *Wrigley, supra,* 451 *N.W.*2d at 488; Tatarowicz, State Judicial and Administrative Interpretations of U.S. Public Law 86-272, 38 *Tax Lawyer* 294, 317 (1985); *Ringgold Coal Mining Co. v. Taxation Div. Director,* 4 *N.J. Tax* 321, 333 (Tax Ct. 1982). This strict constructionist approach to P.L. 86-272 has been followed by many state courts around the country. *Sjong v. Alaska State Dept. of Revenue,* 622 *P.*2d 967 (Alaska 1981), *appeal dismissed* 454 *U.S.* 1131 (1982); *U.S. Tobacco Co. v. Martin,* 304 *Ark.* 119, 801 *S.W.*2d 256 (1990); *Hervey v. AMF Beaird, Inc.*, 250 *Ark.* 147, 464 *S.W.*2d 557 (1971); *Drackett Products Co. v. Conrad,* 370 *N.W.*2d 723 (N.D. 1985); *National Tires, Inc. v. Lindley,* 68 *Ohio App.*2d 71, 426 *N.E.*2d 793 (1980); *Herff Jones Company v. State Tax Comm.*, 217 *Or.* 404, 430 *P.*2d 998 (1967). However, the following state courts have interpreted the statutory exemption quite broadly. *Ind. Dept. of Revenue v. Kimberly-Clark Corp.*, 275 *Ind.* 378, 416 *N.E.*2d 1264 (1981); *Deseret Pharm. Co., Inc. v. State Tax Comm.*, 579 *P.*2d 1322 (Utah 1978); *U.S. Tobacco Co. v. Comm.*, 478 *Pa.* 125, 386 *A.*2d 471, *cert. denied,* 439 *U.S.* 880 (1978); *Gillette Company v. State Tax Commission,* 56 *A.D.*2d 475, 393 *N.Y.S.*2d 186 (1977), aff'd, 410 *N.Y.S.*2d 65, 382 *N.E.*2d 764 (1978); *Coors Porcelain Company v. State,* 183 *Colo.* 325, 517 *P.*2d 838 (1973), *cert. denied,* 419 *U.S.* 874 (1974); *State v. State Tax Commission,* 382 *S.W.*2d 645 (Mo. 1964).

An "intermediate" interpretation or "pre-sale/post-sale" test, was applied in *Wrigley* by the Wisconsin Court of Appeals, *William Wrigley, Jr. Co. v. Wis. Dept. of Rev.*, 153 *Wis.*2d 559, 451 *N.W.*2d 444, 452 (Wis. App. 1989); *see also Miles Laboratories, Inc. v. Dept. of Revenue,* 274 *Or.* 395, 546 *P.*2d 1081, 1083 (1976); *Chattanooga Glass Co. v. Strickland,* 244 *Ga.* 603, 261 *S.E.*2d 599, 600-601 (1979).

accepted by the Wisconsin Supreme Court in *Wrigley,* that all in-state activities which eventually lead to increased orders are encompassed under the umbrella of "solicitation of orders." *Compare, Clairol, supra,* 109 *N.J. Super.* at 30, 262 *A.*2d at 218, with *Wrigley, supra,* 465 *N.W.*2d at 811. Under the strict New Jersey approach, various "pre-sale activities" carried on by multistate firms such as Wrigley, including stocking product displays and taking inventory of retailers' stock, exceed the solicitation of orders because the multistate company is directly assisting local retailers in maintaining their in-state business operations. *Clairol, supra,* 109 *N.J.Super.* at 28-30, 262 *A.*2d at 217; *Accord, National Tire, Inc. v. Lindley,* 68 *Ohio App.*2d 71, 426 *N.E.*2d 793, 798 (1980); *U.S. Tobacco Co. v. Martin,* 304 *Ark.* 119, 801 *S.W.*2d 256, 259 (1990).

New Jersey's strict interpretation of P.L. 86-272 is firmly supported by the statute's legislative history. Shortly after this Court's decision in *Northwestern States Portland Cement Co. v. Minnesota,* 358 *U.S.* 450 (1959), hearings were held and bills were hurriedly introduced in Congress to reverse that decision in response to an outcry from the multistate business community. P.L. 86-272, in the form initially introduced in the Senate (S. 2524), would have curtailed the taxing power of the States far more than the law as finally enacted. What is now P.L. 86-272 originally included a third paragraph which would have extended the tax exemption to insulate:

> The maintenance and operation by such person, or by his representative, in such state of an office the primary purpose and use of which is to serve representatives of such person who are engaged in the solicitation of orders described

> in paragraph (1) or (2), or both, and to receive, process, and forward such orders. [105 *Cong. Rec.* 16,355 (1959)].

This original bill, however, met with very stiff opposition on the floor of the Senate led by Senators Gore, McCarthy, Sparkman and Talmadge. The main concern expressed was that the bill, designed principally to relieve small and medium-sized firms from the costs of complying with the tax laws of any state in which they engaged in only minimal soliciting activity, would be taken advantage of by large corporations with substantial activities in market states, thus disadvantaging domestic businesses and depriving the States of a significant revenue source.* Senator Gore pointed out that the bill would place small, local businesses at a competitive disadvantage relative to large manufacturers selling throughout the country:

> Just what does this bill do? Briefly, it prevents the States from taxing companies which sell their products within the States so long as the companies limit their activities to maintaining a sales office and combing the State with salesmen. This means that a New York manufacturing company can go into Georgia and compete with Georgia manufacturers, or with companies which maintain branch plants or warehouses in Georgia, and pay no State income taxes. The Georgia company must pay taxes for both, or else the individual citizens of Georgia must make up the difference.

---

* Senator Neuberger of Oregon also expressed his State Tax Commission's concern about substantial loss of state revenue had the original bill been enacted. 105 *Cong. Rec.* 16,494 (1959).

> The short range effects of this bill will be felt by the consuming States of the South and West. Small businesses in these areas will suffer unfair competition from out-of-state companies. Warehouses and branch plants will be closed in these areas as the larger companies consolidate their activities. [105 *Cong. Rec.* 16,360 (1959)].

Senator McCarthy expressed a similar concern:

> Presented in the name of a bill to protect small business, it will establish a situation in which a foreign corporation – that is, a corporation established in another State from that State which attempts to impose the tax – may very well have an advantage by way of tax differential. [105 *Cong. Rec.* 16,376 (1959)].

As a result of this dissatisfaction with the bill as originally introduced, Senator Talmadge proposed an amendment to delete paragraph 3, 105 *Cong. Rec.* 16,470 (1959), which was passed by the Senate. 105 *Cong. Rec.* 16,477 (1959). It appears to have been the intent of Congress in deleting paragraph 3 to lessen the restriction of P.L. 86-272 upon the States' power to tax interstate business. As Senator Hillard of Florida stated:

> It seems to me that the Senator from Georgia [Senator Talmadge] not only has the correct idea in offering his amendment, but that his idea is in the interest of the preservation of the right of States to decide according to their own sovereign pleasure, whether they wish to resort to state income taxation. [105 *Cong. Rec.* 16,472 (1959)].

The fact that P.L. 86-272 in its final form, after the Talmadge floor amendment, provided far *less* protection to interstate business interests compared to the broad scope

of the original bill, was commented upon forcefully on the Senate floor by Senator Byrd, Chairman of the Senate Finance Committee, who had been one of the original bill's strongest supporters:

> [A]ll in the world the bill would do is to say that business which originates from the solicitation of a traveling salesman, who does not have an office and who does not have any facilities whatever, except perhaps his own automobile or his own legs, which business originates in one State when title is transferred in another State, since the sale is not consummated in the State involved, is business which shall not be taxed, as interstate commerce, in regard to income taxes. *That is all the bill would do. It has been stripped down to the point that that is the only thing the bill would do.* [105 *Cong. Rec.* 16,493 (1959); emphasis supplied]

As S. 2524 was substantially modified before passage, the Wisconsin Supreme Court placed excessive reliance upon the Senate Committee's report on the *original* bill. *Wrigley, supra,* 465 *N.W.*2d at 807-8 & 812. P.L. 86-272 *as enacted* provides, and was intended to provide, far less protection to interstate business interests than the bill as originally reported out of the Senate Finance Committee. The floor amendments responded to the concerns of the Committee *minority* who warned against "curtailing the ability and choice of the States to raise sufficient revenue to carry out proper and necessary State functions." S.Rep. No. 658, 86th Cong., 1st Sess.; Minority Views, 1959 *U.S. Code Cong. & Admin. News,* p. 2557. Thus, the Wisconsin Supreme Court's expansive interpretation of the term "solicitation of orders" in P.L. 86-272 is contrary to the legislative intent.

Given this legislative history, the term "solicitation of orders" in P.L. 86-272 is most properly construed narrowly, as in *Clairol.* There is no basis whatsoever in the statute for the Wisconsin Supreme Court's holding that any type or amount of business activity other than solicitation of orders qualifies for the exemption from state income tax under P.L. 86-272. As the Supreme Court of Missouri stated in *Amway Corp., Inc. v. Director of Revenue,* 794 *S.W.*2d 666 (Mo. banc 1990), "it is not the *quantity* of activity that determines whether the federal statute is a shield against state income tax liability. The statutory prohibition on taxation is determined by the *quality* of the activity." *Id.* at 670; emphasis supplied. The prohibition on imposition of the state net income tax is applicable if the corporation's "*only* business activity" within the State is the solicitation of orders. 15 *U.S.C.* §381(a); emphasis supplied. Had Congress intended to permit interstate companies to conduct some small amount of other business in the State yet preserve the state income tax prohibition, less absolute statutory language could have been employed. For instance, Congress might have granted the exemption where the "primary" or "predominant" business activity was solicitation of orders.*

---

* As originally proposed, S. 2524 included a paragraph permitting maintenance of "an office the *primary purpose* and use of which is to serve representatives of such person who are engaged in solicitation of orders." 105 *Cong. Rec.* 16,355 (1959). This paragraph was deleted by floor amendment. 105 *Cong. Rec.* 16,477 (1959). Surely, if *any* activities in addition to solicitation of orders were to be protected, Congress could have retained the "primary purpose" language in some form, rather than deleting it in full.

Furthermore, a narrow judicial construction of P.L. 86-272 is fully appropriate because the statute imposes a unique Congressional limitation on the States' fundamental power to raise tax revenue. This Court has frequently held that any state statute which grants exemption from state or local taxes should be strictly construed. *Wright v. Nagle*, 101 *U.S.* 791 (1879); *Bank of Commerce v. State of Tenn.*, 109 *U.S.* 493 (1881); *Hoge v. Richmond & D.R. Co.*, 99 *U.S.* 348 (1878):

> The power of taxation is an attribute of sovereignty and is essential to every independent Government. Stripped of this power, it must perish. Whoever, therefore, claims its surrender must show it in language which will admit no other reasonable construction. [*Id.* at 353].

Since P.L. 86-272 creates an unusual federal exemption from state taxation, general principles of comity and federalism call for a strict construction by the judiciary. While this Court has retreated from judicial invocation of the 10th Amendment to shield traditional state functions from federal initiatives under the Commerce Clause, *Garcia v. San Antonio Metro Transit Authority*, 469 *U.S.* 528 (1985), the Court should narrowly interpret a federal statute that restricts state sovereignty in so important an area as the raising of revenue. As this Court stated when considering the impact of P.L. 86-272 on an otherwise valid state regulatory scheme:

> [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance. [*Heublein v. South Carolina Tax Com.*, 409 *U.S.* 275, 281 (1972) quoting *United States v. Bass*, 404 *U.S.* 336, 349 (1971)].

Here, the Wisconsin Supreme Court's expansive construction of P.L. 86-272 has dismantled the compromise between protection of interstate commerce and preservation of state revenue sources which was forged in Congress during the passage of P.L. 86-272. The States look to this Court to restore the balance through a strict construction of the statute.

CONCLUSION

The Amici States respectfully request that this Court reverse the decision of the Wisconsin Supreme Court and hold that P.L. 86-272 does not prohibit the Wisconsin Department of Revenue from collecting the Wisconsin franchise tax against William Wrigley, Jr. Company.

Respectfully submitted,

ROBERT J. DEL TUFO
Attorney General of New Jersey
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 633-8455

MARY R. HAMILL
Deputy Attorney General
Of Counsel

SARAH T. DARROW
Deputy Attorney General
Counsel of Record
On the Brief